

PROCEDURES, APPEALS, & STAYS

A. General Procedures

The controlling provisions for bond/custody redetermination hearings before an Immigration Judge are found at INA § 236; 8 C.F.R. §§ 1003.19 and 1236.1:

A bond hearing may be requested orally or in writing. 8 C.F.R. § 1003.19(b). The IJ may allow a telephonic request. *Id.*

An IJ may not redetermine custody status sua sponte. *Matter of P-C-M-*, 20 I&N Dec. 432, 434 (BIA 1991).

The bond hearing is separate and apart from, and shall form no part of the removal hearings. 8 C.F.R. § 1003.19(d). However, the same IJ can hear both the bond and merits hearings. *Flores-Leon v. INS*, 272 F.3d 433, 440 (7th Cir. 2001).

There is no right to discovery in bond proceedings. *Matter of Khalifah*, 21 I&N Dec. 107, 112 (BIA 1995).

The IJ may give DHS additional time to conduct a security check before setting the bond hearing. 8 C.F.R. § 1003.47(k).

The IJ may raise or lower bond. *Matter of Spiliopoulos*, 16 I&N Dec. 561, 562-63 (BIA 1978).

DHS and the IJ may not deny bond or use bond punitively because the alien sought judicial review. *Matter of Au*, 13 I&N Dec. 133, 138 (BIA 1968) ("To deny enlargement to an otherwise bailable alien merely because he has sought judicial review would constitute an impermissible restraint on the statutory right of judicial review, however justified the District Director might be in his conclusion that the litigation is frivolous and brought solely for delay.").

The IJ cannot force a person to give DHS information as a condition of release. *United States v. Witkovich*, 353 U.S. 194, 202 (1957).

The determination of an IJ with respect to custody status of bond redetermination shall be entered on the appropriate form and the parties shall be informed orally or in writing of the reasons for the decision. 8 C.F.R. § 1003.19(f).

***DHS Notification of Alien's Custody Status:** While any proceeding is pending before EOIR, DHS shall immediately advise the Immigration Court having administrative control over the Record of Proceeding of a change in the respondent's custody location or of release from DHS custody, or subsequent taking into DHS custody, of a respondent. This notification shall be in writing and shall state the effective date of the change in custody location or status, and the respondent's current fixed street address, including zip code. 8 C.F.R. § 1003.19(g); see also 8 C.F.R. § 1236.1(f).

B. Subsequent/Successive Redetermination Requests

So long as a person is in DHS's physical custody and has not received a final administrative removal order from the BIA, a party may make successive applications for bond to the IJ. *Matter of Uluocha*, 20 I&N Dec. 133, 134 (BIA 1989).

No motion to reopen is required. *Matter of Uluocha*, 20 I&N Dec. 133, 134 (BIA 1989).

Subsequent redetermination requests must be made in writing and based on a showing that the alien's circumstances have changed materially since the initial bond redetermination hearing. 8 C.F.R.

§§ 1003.19(b), (e); *Matter of Uluocha*, 20 I&N Dec. 133, 134 (BIA 1989) (citing *Matter of Chew*, 18 I&N Dec. 262, n.2 (BIA 1982)).

C. Appeals and Stays

Appeals to the BIA of an IJ's bond decision must be made within 30 days. 8 C.F.R. §§ 1003.38, 1236.1(d)(3)(i). Appeals of a DD's bond decision must be made within 10 days. 8 C.F.R. § 1236.1(d)(3)(ii).

Filing an appeal from a DD determination or an IJ redetermination shall not operate to delay compliance with the custody order (except for with discretionary or automatic stays under 1003.19(i)), nor stay the administrative proceeding or removal. 8 C.F.R. § 1236.1(d)(4).

***An IJ may redetermine bond even if a previous request is being appealed.** When appropriate, an IJ may entertain a bond redetermination request, even when a previous bond redetermination by the IJ has been appealed to the BIA. *Matter of Valles*, 21 I&N Dec. 769, 771-72 (BIA 1997). If a bond redetermination request is granted by an Immigration Judge while a bond appeal is pending with the BIA, the appeal is rendered moot. *Id.* at 773. Exception: If an IJ declines to change the amount or conditions of bond, DHS must notify the BIA in writing, with proof of service on the opposing party, within 30 days, if it wishes to pursue its original bond appeal (i.e., the respondent cannot defeat a DHS appeal by continually filing redetermination requests). *Id.*

DHS may seek an discretionary stay from the BIA regarding any bond order. 8 C.F.R. § 1003.19(i)(1).

***New Automatic Stay Provisions (Nov. 1, 2006):** DHS may obtain an automatic stay of an IJ's bond order by filing an EOIR-43 within one day of the release order, where the DD denied bond or set bond at \$10,000.00 or more and the IJ authorized release on bond. 8 C.F.R. §§ 1003.19(i)(2), 1003.6(c)(1). Thereafter, DHS must file a notice of appeal consistent with 8 C.F.R. § 1003.38 to the BIA within 10 days of the IJ's decision. 8 C.F.R. § 1003.19(i)(2); see also 71 Fed. Reg. 57873, *57874 (Oct. 2, 2006). **The final rule directs IJs to issue written custody decisions in automatic stay cases within 5 business days after the immigration judge is advised that DHS has filed a notice of appeal. 8 C.F.R. § 1003.6(c)(2); 71 Fed. Reg. 57873, *57875 (Oct. 2, 2006).** Detailed procedures are found at 8 C.F.R. § 1003.6(c); see also OPM; note: automatic five day stays of a BIA release are detailed in 8 C.F.R. § 1003.6(d) and have been held unconstitutional. *See, e.g., Zavala v. Ridge*, 310 F. Supp. 2d 1071 (N.D. Cal. 2004) (LPR detained by virtue of automatic stay successfully petitioned for writ of habeas corpus; stay violated SDP and PDP; regulation is invalid as *ultra vires*, goes beyond INA authority by eliminating IJ discretionary authority).

***A DHS merits appeal does not stay a custody release.** *Matter of Joseph*, 22 I&N Dec. 660, 669 (BIA 1999) ("To the extent that *Valles* may be read as suggesting that a Service appeal from an Immigration Judge's decision finding an alien not removable or deportable operates in any way to stay an Immigration Judge's release order, we now expressly reject that proposition. Since an appeal from the release order itself would not suffice to stay the release of an alien without the additional operation of one of the stay procedures in 8 C.F.R. § 1003.19(i), it follows that a merits case appeal will not stay an Immigration Judge's release order.").